

**STATE OF MINNESOTA  
MINNESOTA ENVIRONMENTAL QUALITY BOARD**

**In the Matter of the Proposed  
Adoption of Amendments to  
Environmental Review Rules  
For Large Energy Facilities  
and High Voltage Transmission Lines,  
Repeal of Existing Rules, and  
Technical Amendments to  
Power Plant Siting Rules**

**COMMENTS OF  
SIERRA CLUB**

**Minnesota Rules chapter 4410  
Minnesota Rules chapter 4400**

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**I. BACKGROUND AND INTRODUCTION**

The Sierra Club is a national environmental organization with over 700,000 members and approximately 19,000 members who reside in Minnesota. Since June 2000, the Sierra Club has coordinated an Air Toxics Campaign in Minnesota to reduce air pollutants that affect human health and the natural environment, including emissions from fossil fuel power plants. The Sierra Club participated in recent Environmental Quality Board (EQB) rulemaking processes pertaining to siting and routing of power plants and power lines, in certificate of need hearings pertaining to Xcel Energy's efforts to site high voltage transmission lines in Southwestern Minnesota and in legislative advocacy pertaining to energy issues. The Sierra Club previously submitted comments regarding these Rules on December 6, 2002.

The Sierra Club appreciates the EQB's efforts to clarify the nature of environmental review in the certificate of need process and to provide a more independent review of environmental issues at the critical decision point where issues of size, type and timing of energy resources will be decided. The Sierra Club also recognizes the efforts that EQB staff have made to provide public participation within the strictures of a compressed timeline. However, the Sierra Club has concerns regarding the Proposed Rules, which suggest the need for clarifications and minor modifications of text. We also take issue with proposals for amendments which industry representatives raised in public meetings with the EQB on May 28, 2003. Our concerns are as follows:

- 1) The Proposed Rules should more clearly define the alternatives that must be considered, particularly in the case where there is a joint hearing on need and siting.
- 2) The Proposed Rules should more clearly harmonize with the Minnesota Environmental Policy Act, as required by governing statutes and court decisions.

- 3) The Proposed Rules should be clarified to allow more meaningful public participation:
  - Applicants should be required to disclose any sites and routes under consideration and provide mailed notice to property owners who can be identified with reasonable effort.
  - Scoping and comment procedures should be revised to provide members of the public a stronger role in the process.
- 4) Efforts of industry representatives to dilute the efficacy of environmental review in certificate of need proceedings should be rejected.

The following sections summarize the Sierra Club's concerns and recommendations regarding the Chapter 4410 Proposed Rules. The Sierra Club respectfully requests that the EQB incorporate our proposed amendments into the final Rules approved by the EQB to ensure the efficacy of environmental review of large power plants and power lines at the certificate of need stage. We also ask that the EQB resist any efforts of industry to dilute the beneficial purposes of these rules and that the EQB and the Public Utilities Commission should make every effort to obtain parties' consent to operate under the Proposed Rule pending their final effective date.

## **II. DISCUSSION**

### **1. Provide Meaningful and Timely Consideration of Alternatives**

The requirement in the Proposed Rules that the environmental report include a consideration of alternatives should be strengthened in order to comply with governing statutory language, not weakened as industry representatives have proposed.

The Proposed Rules require that the environmental report include a general description of alternatives to the project, including the no-build alternative, demand side management, purchased power, facilities of a different size or using a different source than the source proposed by applicant, generation rather than transmission if a high voltage transmission line is proposed, transmission rather than generation if a large electric power generating plant is proposed, use of renewable energy sources and those alternatives identified by the chair in the scoping process. Proposed Minn. Rule 4410.7035, Subpart 1(B).

In the May 28, 2003 public hearing, industry representatives challenged the requirement that alternatives be considered, suggesting that utilities proposing transmission should not be subjected to any analysis of generation related to their power line projects. This industry position is clearly contrary to Minnesota statutes, which require that non-transmission alternatives be considered before power lines are built. Minnesota law also requires the source of generation be evaluated for transmission as well as generation, in order to reflect State policy preference for renewable resources:

In assessing need, the commission shall evaluate . . . (6) possible alternatives for satisfying the energy demand of transmission needs including but not limited to potential for increased efficiency and upgrading of existing energy generation and transmission facilities, load-management programs, and distributed generation. Minn. Stat. 216B.243, Subd.3.

The commission may not issue a certificate of need under this section for a large renewable energy facility that generates electric power by means of a nonrenewable energy source, or that transmits electric power generated by means of a nonrenewable energy source, unless the applicant for the certificate has demonstrated to the commission's satisfaction that it has explored the possibility of generating power by means of renewable energy sources and has demonstrated that the alternative selected is less expensive (including environmental costs) than power generated by a renewable energy source. Minn. Stat. 216B.243, Subd.3a (emphasis added).

Proposals to narrow the consideration of alternatives to transmission should be summarily rejected as contrary to Minnesota law.

The Proposed Rules should also be clarified to ensure that the review of alternatives is sufficient to follow the statutory framework. The Sierra Club proposes that the language in Proposed Minn. Rule 4410. 7035(B) be modified slightly to ensure that the review of alternatives is meaningful:

#### 4410.7035 CONTENT OF ENVIRONMENTAL REPORT

Subpart 1. **Content of environmental report.** The environmental report must include the items described in items A to H. . .

B. A ~~general~~ thorough description of the alternatives to the proposed project that are addressed.

The Sierra Club also proposes that the section pertaining to scoping be clarified so that it doesn't permit an interpretation inconsistent with Proposed Minn. Rule 4410.7035, Subp. 1(B). An interpretation that allowed scoping to exclude alternatives could also create a conflict with the statutes cited above. Suggested language for Proposed Minn. Rule 4410.7025, Subp. 6 is as follows:

#### 4410.7025 COMMENCEMENT OF ENVIRONMENTAL REVIEW

Subp. 7. **Chair decision.** Within ten days after close of the public comment period, the chair shall issue an order determining the following:

A. the alternatives to be addressed in the environmental report including the alternatives required by 4410.7035, Subp. 1(B) and any additional alternatives proposed under subpart 6 of this section.

The section of the Proposed Rules pertaining to joint proceedings raises an additional serious concern pertaining to consideration of alternatives. In providing that

the EQB may elect to prepare a single environmental impact statement (EIS), instead of both an environmental report and an EIS, the Proposed Rules fail to clarify that an EIS prepared under this circumstance must include a full consideration of the no-build alternative and other alternatives described in Proposed Rule 4410.7035, Subp. 1(B). Clearly, an EIS prepared by the EQB in a joint proceeding would come before the certificate of need proceeding and should be designed to inform that proceeding. The strictures on an EIS performed after a certificate of need has been issued (Minn. Stat. 116C.53, Subd. 2, Minn. Stat. 116C57, Subd. 2c) should be inapplicable.

Clarification of the scope of an EIS prepared in joint proceedings will prevent disputes about environmental review and ensure that the Public Utilities Commission has before them the information required to make an informed decision on need. The Sierra Club would propose the following clarification in Proposed Rule 4410.7060 regarding joint proceedings:

#### 4410.7060 JOINT PROCEEDINGS

Subpart 1. **Environmental assessment.** In the event an applicant for a certificate of need for a LEPGP or a HVTL has also applied to the EQB for a site permit or route permit, and the project qualifies for alternative review by the EQB under part 4400.2000, the EQB may elect to prepare an environmental assessment in accordance with part 4400.2750 in lieu of the environmental report required under part 4410.7020. If the EQB makes this election the EQB shall include in the EIS the analysis of alternatives required by 4410.7035, but it is not required to prepare an additional environmental report under parts 4410.7010 to 4410.7070.

Subp. 2. **Environmental impact statement.** In the event an applicant for a certificate of need for a LEPGP or a HVTL has also applied to the EQB for a site permit or route permit, and the project does not qualify for alternative review by the EQB under part 4400.2000, the EQB may elect to prepare an environmental impact statement in lieu of the environmental report required under part 4410.7020 if the applicant agrees to the additional time that will be required to prepare the environmental impact statement. In this event, the EQB shall include in the EIS the analysis of alternatives required by 4410.7035, but is not required to prepare an additional environmental report under part 4410.7020.

To ensure that the EIS is coordinated with the Public Utilities Commission process in a joint proceeding, the Proposed Rules must also clarify the timing of action where the EQB prepares an EIS rather than an environmental report prior to issuance of the certificate of need. Recommended language is proposed below for Proposed Minn. Rule 4410.7050:

#### 4410.7050 ENVIRONMENTAL REPORT TO ACCOMPANY PROJECT

Subpart 1. **PUC decision.** The environmental report or EIS prepared pursuant to 4410.7060 must be completed and a copy provided to the Public Utilities Commission before the PUC can commence any public hearing or render a final decision on an application for a certificate of need or for certification of a HVTL.

The EQB staff shall participate in the PUC proceeding and be available to answer questions about the environmental report or EIS prepared pursuant to 4410.7060 and to respond to comments about the document. The environmental report or EIS prepared pursuant to 4410.7060 must be considered by the PUC in making a final decision on a certificate of need or HVTL certification request.

Subp. 2. **Completeness of environmental report.** At the time the PUC makes a final decision on a certificate of need application or a request for certification of a HVTL, the PUC shall determine whether the environmental report and the record created in the matter address the issues identified by the chair in the decision made pursuant to part 4410.7030, subpart 7. The PUC may direct the EQB to prepare a supplement to the environmental report or EIS prepared pursuant to 4410.7060 if the PUC determines that an additional alternative or impact should be addressed or supplemental information should be provided.

Consideration of alternatives and their environmental impacts is at the heart of environmental review. The above clarifications of the Proposed Rules will ensure that the consideration of alternatives is meaningful, timely and conducted in compliance with applicable law to assist in the determination of need for power generation and transmission facilities.

## **2. Harmonize with the Minnesota Environmental Policy Act**

Minnesota case law has consistently interpreted laws pertaining to power plant and power lines to harmonize with the Minnesota Environmental Rights Act and the Minnesota Environmental Policy Act. As the Minnesota Supreme Court stated in People for Environmental Enlightenment and Responsibility v. Minnesota Environmental Quality Council, 266 N.W. 2d 858, 865 (Minn. 1978), evaluating power line siting provisions,

Although the focus of each of these statutes is slightly different, together they are part of a coherent legislative policy, one whose aims are to harmonize the need for electric power with the equally important goal of environmental protection. . . Rather than intending the PPSA [Power Plant Siting Act] to supersede MERA [Minnesota Environmental Rights Act], the legislature passed all these statutes to ensure that administrative agencies would discharge fully their environmental responsibilities.

The Proposed Rules, by providing the EQB with a clear role in preparing the environmental report, take an important step to create consistency. The Sierra Club believes that the requirement to analyze alternatives in harmony with the Minnesota Environmental Policy Act should be made more explicit to ensure that environmental responsibilities are fully discharged.

The Sierra Club would point out that applicable statutes already provide that the certificate of need must be consistent with the standards of the Minnesota Environmental Policy Act. The certificate of need statute, Minn. Stat. 216B.243, Subd. 7, states that the

decision of the Minnesota Public Utilities Commission pertaining to need is binding on other agencies, *except as provided by* 116C.01 to 116C.06, which constitute and empower the EQB and *by* 116D.04, subdivision 9, which permits the EQB to delay implementation of any agency decision significantly affecting the environment which is inconsistent with the Minnesota Environmental Policy Act. The relevant statute reads as follows:

Prior to the final decision upon any state project or action significantly affecting the environment or for which an environmental impact statement is required, or within ten days thereafter, the board may delay implementation of the action or project by notice to the agency or department and to interested parties.

Thereafter, within 45 days of such notice, the board may reverse or modify the decisions or proposal where it finds, upon notice and hearing, that the action or project is inconsistent with the policy and standards of sections 116D.01 to 116D.06. Any aggrieved party may seek judicial review pursuant to chapter 14. Minn. Stat. 116D.04, Subd. 9(emphasis added)

The Sierra Club suggests that it would be more efficient to ensure that the environmental report was prepared consistent with MEPA than to delay after the fact and reverse a decision as permitted under Minn. Stat. 116D.04, Subd.9. A minor change in the section of the Proposed Rules pertaining to the content of the environmental report is suggested:

#### 4410.7035 CONTENT OF ENVIRONMENTAL REPORT

Subpart 1. **Content of environmental report.** The environmental report must include the items described in items A to H. . .

F. An analysis of the feasibility of each alternative considered and an identification of any feasible and prudent alternative consistent with the requirements of Minn. Stat. 116D.04, Subd. 6.

This clarification will assist in harmonizing applicable laws addressing need for electric power and environmental considerations.

### **3. Facilitate Meaningful Public Participation**

With these Proposed Rules, the EQB will be taking an important step to support public participation in the selection of generation and transmission alternatives. However, two aspects of the Proposed Rules still create barriers for meaningful public participation. First, the Proposed Rules inadequately provide notice to the persons most directly affected by power plants and power lines; the property owners living near such proposed facilities. Second, the Proposed Rules constrain the ability of members of the community to propose alternatives, which is a critical aspect of environmental review.

These Proposed Rules should require the applicant to identify all sites or routes that are being actively considered for the location of its facility. It is disingenuous and serves no purpose other than to avoid public participation for a certificate of need to proceed without disclosure of probable sites and routes that are already under

consideration by the applicant. A minor modification of text that would prevent this evasion is suggested for Proposed Minn. Rule 4410.7025:

4410.7025 COMMENCEMENT OF ENVIRONMENTAL REVIEW.

Subpart 1. **Certificate of need application.** A person who submits an application to the Public Utilities Commission for a certificate of need for a LEPGP or a HVTL pursuant to Minnesota Statutes, section 216B.243, shall at the same time submit a copy of the application and all accompanying materials required by the PUC to the EQB and shall identify the location of any sites for the LEPGF or routes for the HVTL under consideration by the applicant.

Subp. 2. **Transmission planning report.** A person who submits a transmission planning report to the Public Utilities Commission with a request for certification of a high voltage transmission line pursuant to Minnesota Statutes, section 216B.2425, shall at the same time submit a copy of the report and all accompanying materials required by the PUC to the EQB, identifying in such materials the location of routes for the HVTL under consideration by the applicant.

Once the applicant identifies the location of sites and routes under consideration for the facility, the next step must be to assure that persons who own property near the proposed project are given notice. The language of the Proposed Rules seems to have this objective, but may have a different result due to some problems with phrasing. The current text suggests that only those persons already known to the EQB would receive notice. Since property tax data bases are kept by counties and other local units of government rather than the EQB, one could interpret this language, paradoxically, to exclude rather than require public notice.

The Environmental Quality Board has already adopted Rules specifying the method by which notice should be provided when a specific power plant site or power line route has been identified. *See* Minn. Rules 4400.1350. To allow consistency as well as fair notice to community members, the Sierra Club recommends that the requirements of this Rule apply to environmental review for certificate of need when a specific location for a power plant or power line is under consideration.

4410.7030 PROCESS OFR PREPARATION OF ENVIRONMENTAL REPORT

Subpart.1. **Notice to interested persons.** . . . Notice must be mailed to the following persons . . .

D. when the site for a LEPGF or a route for a HVTL has been identified pursuant to 4410.7025, notice shall be mailed by the applicant to adjacent property owners as required by 4400.1350, Subp. 2(C). ~~those persons known to the EQB to own property or reside in the area of the proposed project.~~

In order to ensure that persons on the EQB's various lists and property owners realize the importance of the process for which this notice has issued, the fact that certificate of need may foreclose future review of alternatives should also be clearly stated in the notice as follows:

4410.7030 PROCESS FOR PREPARATION OF ENVIRONMENTAL REPORT  
Subpart 2. **Content of notice.** The notice required by subpart 1 must contain the following information:

E. a statement that, if a certificate of need is issued, there will be no other opportunity to reevaluate whether the project should be built or alternatives pertaining to the need for the project, including size, type, and timing; alternative system configurations; and voltage.

The Sierra Club recognizes that the timeline for the certificate of need process is brief, which in itself is a burden upon public participation. But, within this constraint, it is clear that the Proposed Rules are an effort to create a meaningful role for citizens. To assure that their participation is well-informed and effective, the Sierra Club would suggest that the Proposed Rules be modified to assure that citizens have access to the certificate of need or planning report on request prior to the public meeting. The Sierra Club would also suggest that citizens be given a more realistic opportunity to contribute to the process of determining the scope of the environmental report. Assuring that citizens may have access to information prior to the public hearing is a simple change:

4410.7030 PROCESS FOR PREPARATION OF ENVIRONMENTAL REPORT.  
Subp. 2. **Content of notice.** The notice required by subpart 1 must contain the following information:

B. a statement that authorization has been applied from the Public Utilities Commission has been applied for, and a description of the PUC process and a statement that a copy of the application is available from the EQB on request.

Subp. 4. **Conduct of public meeting.** The EQB shall make available at the public meeting and to members of the public requesting such materials prior to the meeting a copy of the certificate of need application or transmission planning report. The EQB staff shall explain the process for preparation of the environmental report. At the public meeting, the public must be afforded an opportunity to ask questions and present comments and to suggest alternatives and possible impacts to be evaluated in the environmental report. The EQB shall keep an audio recording of the meeting. The EQB shall provide at least ten days from the day of the public meeting for the public to submit written comments regarding the proposed project.

To ensure that members of the public have a fair opportunity to propose alternatives or possible adverse impacts in the scoping process, the Sierra Club recommends less subjective phrasing for the chair's consideration of alternatives in the process of preparing an environmental report.

4410.7030 PROCESS FOR PREPARATION OF ENVIRONMENTAL REPORT.  
Subp. 6. **Alternatives and impacts.** . . .The chair shall include the alternative or impact in the environmental report ~~only if the chair determines that the~~ evaluation will assist the PUC in its decision on the certificate of need application or HVTL



certification request or provide information needed to identify a feasible and prudent alternative under Minn. Stat. 116D.04, Subd. 6.

In addition to making the standard for including alternatives less subjective, the Sierra Club suggests that a meaningful public role in the scoping process requires a mechanism to appeal a negative decision of the chair to the EQB board. The Proposed Rules fail even to cross-reference existing Rules which permit citizens to ask that matters be placed on the EQB agenda, Minn. Rules 4405.0600, Subp. 5, let alone to permit members of the public to request review of the chair's discretion to exclude alternatives and impacts from the scope of the environmental report. Without this check and balance, it is possible that an omission from the environmental analysis won't be discovered until late in the PUC hearing process or, after hearing, on judicial review of the PUC's decision. For these reasons, the Sierra Club would suggest that the Proposed Rules provide a mechanism for review of discretion in scoping the environmental report:

4410.7030 PROCESS FOR PREPARATION OF ENVIRONMENTAL REPORT  
Subp. 7. Chair decision. . . . Once the chair has issued an order establishing the matters to be evaluated in the environmental report, the order must not be changed except upon a decision by the chair or the board that substantial changes have been made in the project or substantial new information has arisen significantly affecting the potential environmental effects of the project or the availability of reasonable alternatives. The chair may elect to bring to the EQB any decisions regarding what should be included in the environmental report. In that event, the chair shall bring the matter to the board at the next regularly scheduled meeting or at a special meeting. Persons requesting that matters be included in the environmental report pursuant to subpart 6 may appeal that decision to the board at such regularly scheduled meeting or special meeting.

The Sierra Club also recommends that any member of the public who participates in the environmental review process should be provided with notice by the PUC and entitled to participate in any subsequent hearings or proceedings at the PUC pertaining to the proposed project.

#### **4. Reject Industry Proposals to Weaken Environmental Review**

In the public meeting on May 28, 2003, industry representatives proposed several changes to the Proposed Rules which would weaken their efficacy and distort their purpose. The Sierra Club requests that the EQB reject industry proposals to restrict the scope of alternatives considered, eliminate the requirement that other agencies or units of governments consider the environmental report in making their decisions and constrain rather than define environmental review. The Sierra Club also supports the suggestion that, after the EQB has approved the Proposed Rules, efforts be made to operate under their provisions, pending a final effective date.

Efforts by industry to constrain the scope of alternatives considered in transmission matters have been previously discussed. Constraint of alternatives would not only contravene sound environmental policy, it would conflict with specific Minnesota

state laws. There is no federal authority which precludes consideration of generation alternatives in the certificate of need process. In fact, there is precedent that certificate of need decisions are exclusively within the states' jurisdiction:

It is widely recognized in regulatory law that the FERC is the absolute authority over the economic regulation of transmission of electricity in interstate commerce. However, it is equally recognized that the FERC has no authority over the construction, siting or certification of any transmission facilities. . . Clearly, this certification authority is reserved for State jurisdiction.

Re N.B. Partners, Ltd. Case No. 88-541-E-P, 98 PUR 4<sup>th</sup> 67, 73 (West Virginia P.S. C. 1988). Siting, certification and environmental issues pertaining to transmission facilities are solely the concern of state regulatory agencies. PSI Energy, Inc. and Consumers Power Company, 55 FERC ¶61,254,1991 WL 527009 (F.E.R.C.) pp. 6-7.

Similarly, the suggestion made by industry that the Proposed Rules should not require other agencies or local governments issuing permits to consider the environmental report is contrary to sound policy and inconsistent with other Minnesota law. The Minnesota Environmental Policy Act specifically requires that if an EIS is required that document shall accompany the proposal through administrative review. Minn. Stat. 116D.04, Subd. 6a. Without the provision in Proposed Rules 4410.7055, environmental consideration would be compromised by limits of local capacity and duplication of the effort on the part of citizens as well as government officials would become far more likely.

Finally, the suggestion of industry representatives that the Proposed Rules replace language pertaining to the scope of the Rules with text stating that no other environmental review should take place is both confusing and misguided. The current text, in Proposed Minn. Rules 4410.4300, Subp. 3 and Subp 6; 4410.4400, Subp. 3 and Subp. 6 and 4410.7010, Subp. 2 states that environmental review for construction of large power plants and power lines and for projects before the PUC shall be conducted according to the cited Chapter 4410 Rules. The editorial comments of industry would be confusing, since additional environmental review documents will necessarily be prepared at the siting and routing stage as required in Chapter 4400. A supplement to the environmental report may also be requested by the PUC under Proposed Minn. Rules 4410.7050, Subp. 2. Even absent further documents, the process of environmental analysis continues through the certificate of need process. The PUC often receives written and oral expert testimony as well as citizen comments pertaining to environmental impacts and alternatives. In fact, the Proposed Rules contemplate this iterative process, requiring that EQB staff be available throughout the PUC proceeding to respond to questions and comments pertaining to its environmental analysis. 4410.7050, Subp. 1.

The Sierra Club would urge the EQB to reject these and any other suggestions by industry to constrain environmental review of power plants and power lines at the vital certificate of need stage. Public participation and careful analysis of alternatives and their

impacts are required to harmonize the need for electric power with the State's environmental and renewable energy priorities.

The Sierra Club, finally, would support the suggestion made by PUC staff at the May 28, 2003 public meeting that efforts be made to obtain consent of the parties to operate under the Proposed Rules. Even after EQB approval, final adoption of the Proposed Rules will take several months, during which applications are likely to be made for certificate of need review. If it were possible to operate by consent of the parties under the new Rules, pending final adoption, members of the public would obtain better notice, environmental review would be more clearly delineated and projects would be more likely to withstand subsequent scrutiny.

### **III. CONCLUSION**

The Sierra Club has appreciated the opportunity to participate in the open process that has led to the development of the Chapter 4410 Rules. The Sierra Club believes that the delineation of EQB responsibility for environmental review in these Proposed Rules is a positive step, as is the effort to improve citizen notice and participation in the process. We have suggested minor, but important clarifications and editing changes to assure that alternatives will be properly considered, that environmental and energy laws will be harmonized and that public participation, especially that of persons living near proposed facilities, will be meaningful. We respectfully request that the EQB incorporate these changes prior to final adoption of the Proposed Chapter 4410 Rules.

The Sierra Club would also request that the EQB resist industry efforts to constrain the environmental review process. Neither law nor policy support the limitations they have proposed. Finally, to the extent possible, the Sierra Club would request that agency staff seek agreement of the parties to operate under the Proposed Rules pending their final adoption.

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Respectfully submitted,

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